IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARCUS DAMION ANDERSON, Appellant.	No. 63779-7-I DIVISION ONE UNPUBLISHED OPINION FILED: July 26, 2010

Leach, j. — Marcus D. Anderson appeals his convictions for one felony count of violating a domestic abuse no-contact order (assault) and one misdemeanor count of violating a domestic abuse no-contact order. He claims the trial court abused its discretion when it denied his motion to sever the two counts. At trial, he admitted to the misdemeanor but denied the felony. A jury convicted him on both counts. He contends that the refusal to sever tainted the jury on the felony charge. Because the jury was properly instructed to consider each count separately, and the State's evidence on both charges was robust, cross-admissible, and simple to understand, Anderson has failed to establish that the trial court abused its discretion. Therefore, we affirm.

Background

On December 4, 2007, the Everett Municipal Court entered a domestic violence no-contact order protecting Amanda Rae Jackson from Marcus D. Anderson until December 4, 2009. The order prohibits Anderson from coming

within 150 feet of Jackson's residence, school, or workplace.

On November 24, 2008, Jackson's co-worker, Mary Turner, observed several marks and bruises on Jackson's face and head. Jackson disclosed to Turner that Anderson had assaulted her sometime after 2:00 a.m. that morning. Turner made a 911 call, and Deputies Reid and Koster were dispatched to Jackson's apartment. Turner and Jackson arrived a short time later. Jackson allowed the deputies to search her vacant apartment.

At the apartment, Jackson told Deputy Koster that Anderson had been living with her for the past two months, that she and Anderson argued earlier that morning, and that Anderson threw her to the ground and punched her in the face six or seven times. She also stated that when she tried to call 911, Anderson took the phone away and would not let her leave until it was time for her to go to work. Deputy Koster located blood near the entry where Jackson described being thrown to the ground and took photographs of her injuries.

The afternoon of November 25, 2008, Deputy Koster followed up on his investigation from the day before and visited Jackson at her residence. He encountered her outside her apartment. She informed him that Anderson was inside her apartment. With Jackson's consent, Deputies Koster, Reid, and Dawson entered the apartment and ordered Anderson to the doorway. As Deputy Koster handcuffed Anderson, Anderson voluntarily made statements denying the commission of any crime. As the police escorted Anderson to their vehicle, he spontaneously yelled out to Jackson, "Nothing would happen if you

didn't say anything." Deputy Koster then read him his Miranda[1] rights and asked if he wished to talk. Anderson replied, "There's nothing to talk about."

The State charged Anderson by amended information with one count of violating a domestic violence no-contact order (assault) for the November 24 incident (felony) and one count of violating a domestic violence no-contact order (misdemeanor) for the incident on November 25.

At the conclusion of a CrR 3.5 hearing, Anderson moved to sever the two counts. After argument, the trial court denied the motion:

> It appears to me this involves a continuing course of conduct occurring a very short time from each other. They are similar in the same kinds of acts, same charge. It appears to me that the defendant would not be unduly prejudiced by having these matters joined for trial.

On the morning of trial, but before jury selection commenced, Anderson again moved to sever. The court considered the facts outlined in the affidavit of probable cause, the anticipated testimony detailed in the parties' pretrial memoranda, and the verbal assertions of counsel. After hearing argument, the judge applied the four-part test announced in State v. York,[2] and denied the motion.

At trial, Anderson called no witnesses and did not testify. He denied the felony count but did not contest the misdemeanor count. Anderson never renewed his motion to sever. The jury was instructed orally and in writing to

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] 50 Wn. App. 446, 451, 749 P.2d 683 (1987).

consider each count separately. It returned a verdict of guilty on both counts.

Anderson appeals.

Standard of Review

We review a trial court's decision to grant or deny a motion to sever charges for an abuse of discretion.[3] The defendant has the burden of demonstrating the trial court abused its discretion.[4]

Analysis

Anderson moved twice to sever the two counts charged, once in a pretrial motion and once on the morning of trial; both motions were denied. On appeal, he claims that the counts together resulted in undue prejudice and impeded a fair determination of his case. The State responds that the trial court's decision was proper, and, in any case, Anderson waived his right to challenge this decision on

appeal by failing to renew his motion during or at the close of all the evidence.[5]

[3] State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).

[4] State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

[5] CrR 4.4(a) also sets out the procedure for filing a motion to sever. It states,

> (1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.
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> (2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

Because Anderson's argument fails on the merits, we need not reach the State's waiver argument.

Under CrR 4.3(a), a defendant may be prosecuted in a single trial for multiple offenses of similar character or similar conduct. CrR 4.4(b) authorizes a court to sever offenses for separate trials "if doing so will promote a fair determination of the defendant's guilt or innocence of each offense, considering any resulting prejudice to the defendant."[6] CrR 4.3.1(a) states that offenses properly joined "shall be consolidated for trial unless the court orders severance pursuant to rule 4.4."

A defendant may be prejudiced by joinder if he or she is embarrassed by the presentation of separate defenses, if a single trial invites the jury to cumulate evidence or infer criminal disposition, or if a single trial otherwise deprives the defendant of a substantive right.[7] However, any potential prejudice may be offset by "prejudice-mitigating" factors.[8] Among the factors to be considered are "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each

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Washington appellate courts have determined that the clause under subsection (a)(2) "before or at the close of all the evidence" means that a failure to raise a severance motion before trial when possible or during trial when necessary waives the issue. See State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998); State v. MacDonald, 122 Wn. App. 804, 814, 95 P.3d 1248 (2004); State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329 (1987).

[6] Bryant, 89 Wn. App. at 864.

[7] Russell, 125 Wn.2d at 62-63.

[8] State v. Hernandez, 58 Wn. App. 793, 798, 794 P.2d 1327 (1990) (quoting State v. Watkins, 53 Wn. App. 264, 269, 766 P.2d 484 (1989)).

count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial."[9] Any residual prejudice from joinder is then weighed against a concern for judicial economy.[10]

Severance is disfavored if the evidence for each charge is strong.[11] But a disparity of evidentiary strength between the charges favors severance if "a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case."[12] In State v. Kalakosky,[13] for instance, the trial court's refusal to sever five separate charges of rape was upheld because the victims' descriptions of events were corroborated by abundant evidence on each count. By contrast, the court in State v. Hernandez[14] reversed two of three convictions for robbery after finding that the evidence on these counts, uncorroborated eyewitness testimony from a single witness, was weak, while the evidence on the remaining count, multiple eyewitnesses claiming to have identified the perpetrator with a high degree of confidence, was robust and likely tainted the weaker claims.

In this case, the State's evidence on each count was strong. On the felony charge, the State anticipated that Jackson would testify that Anderson was in her apartment and repeatedly hit her in the face on the morning of

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[9] Russell, 125 Wn. 2d at 63 (citing State v. Smith, 74 Wn.2d 744, 755-56, 446 P.2d 571 (1968)); York, 50 Wn. App. at 451.

[10] Bythrow, 114 Wn.2d at 718.

[11] State v. Kalakosky, 121 Wn.2d 525, 538-39, 852 P.2d 1064 (1993).

[12] Hernandez, 58 Wn. App. at 801.

[13] 121 Wn.2d 525, 538-39, 852 P.2d 1064 (1993).

[14] 58 Wn. App. 793, 800-01, 794 P.2d 1327 (1990).

November 24. The judge also understood that photographs of blood found in her apartment and of the bruising on her face would likely be submitted as evidence corroborating Jackson's testimony. On the misdemeanor charge, the State anticipated that Jackson and the officers would testify that Anderson was arrested inside Jackson's apartment in clear violation of the no-contact order. Though the evidence on the two charges is somewhat dissimilar, this case is more like Kalakosky than Hernandez. Thus, the first factor mitigates against any potential prejudice resulting from joinder.

The trial judge inquired into the respective defenses on each charge, to which Anderson replied, "[W]ith regard to November 24th, the defense is essentially denying it. . . . With regards to Count II, it's very clear that he was in violation of the order because he was at her residence, and there really will be no factual dispute as to that." This was reflected in closing argument, when it was conceded that Anderson committed the misdemeanor.[15]

Citing to dicta in State v. Russell,[16] Anderson claims that an admission on one and a denial on the other would confuse the jury. We disagree. The two charges were relatively easy to comprehend—each supported by clear and easily understandable evidence. Thus, we are not persuaded that admitting one while denying the other likely confused the jury. We conclude that the clarity of

[15] "[H]e did have contact on the 25th. He was at her apartment on the 25th."

[16] 125 Wn.2d 24, 65, 882 P.2d 747 (1994) (observing that the trial court found the clarity of defense factor to cut against severance because "'[i]t isn't as though . . . there will be an admission of one or denial of another'").

Anderson's defenses also assuages possible prejudice.

In his ruling the judge stated, "I can assure you that the Court will instruct the jury under standard WPIC [Washington Pattern Jury Instructions: Criminal] instructions to consider each crime separately. . . . I would expect the jury to, in good faith, . . . follow those jury instructions." And the jury was so instructed. Instruction 5 read, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count." Notably, Washington courts have approved this instruction in the context of severability determinations.[17]

Finally, ER 404(b) governs the admissibility of other crimes or misconduct at separate trials:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This list of acceptable purposes is nonexclusive. Washington courts have also recognized a "res gestae" or "same transaction" exception, in which evidence of other misconduct is admissible if it constitutes a "link in the chain" of events surrounding the charged offense, the admission of which aids in completing the picture depicted to the jury.[18]

State v. Lane[19] is instructive. In that case, our Supreme Court held that

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[17] Bythrow, 114 Wn.2d at 723.

[18] State v. Hughes, 118 Wn. App. 713, 725, 77 P.3d 681 (2003) (quoting State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)).

witness testimony regarding a series of uncharged robberies and firearm crimes occurring within a 48-hour window of a murder was proximate enough in time and place so as to be admissible as res gestae evidence.[20] Here, the trial judge ruled that the evidence of one offense would likely be admissible in trial of the other.

> [B]ased on the representations as I have already eluded [sic] to, this is an instance where, if not an ongoing matter, at least, they have been very close in time, separated by a day, and they involved the same alleged victim. I think it would be very difficult for the jury to conclude, considering this in a vacuum that, at least, to some degree, I would expect that the evidence in the case would be cross admissible.

The trial court did not abuse its discretion with this evidentiary ruling. Jackson told Deputy Koster that Anderson had been living with her for the past two months in violation of a no-contact order protecting Jackson. Jackson also testified that in the early morning hours of November 24, Anderson repeatedly hit her in the face. This assault precipitated an investigation by Deputy Koster, who determined that Anderson was likely in felony violation of the no-contact order. Because Koster had not yet located and detained Anderson, he followed up his initial investigation on November 25 by returning to Jackson's residence, which led directly to Anderson's arrest. In short, this is similar time, same place, and same victim course of conduct by one individual. Accordingly, we cannot say that the trial court abused its discretion in ruling that the evidence would

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[19] 125 Wn.2d 825, 889 P.2d 929 (1995).
[20] Lane, 125 Wn.22d at 834-35.

likely be cross-admissible.

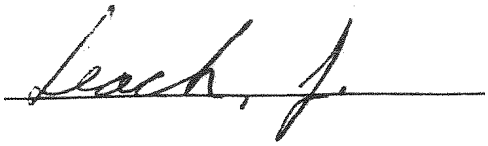
Anderson also claims that he suffered undue prejudice on the felony count by the admission of his statement, "Nothing would happen if you didn't say anything," which would have only been admissible on the misdemeanor charge. Again, we disagree.

Anderson uttered this spontaneous statement as he was being lead from Jackson's apartment. The police first advised him of his Miranda rights afterward. The trial judge decided this evidence was admissible, relevant, and not unduly prejudicial; the jury determined what weight, if any, to give it. Because Anderson's statement "if you didn't say anything" could be understood as referencing the more serious events on November 24, the more innocuous events on November 25, or both, the trial judge did not abuse his discretion by determining that it was potentially relevant and letting the jury decide whether it implicated the events of November 24 or 25.

Conclusion

In summary, all four "prejudice-mitigating" factors are present in this case. Under these facts, Anderson has failed to demonstrate that the trial court abused its discretion in refusing to sever the two counts charged.

Affirmed.



WE CONCUR:

Dwyer, C. J.

Grosse, J.